A

Public Prosecutor v Ee Boon Keat

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45–53 OF 2001
AUGUSTINE PAUL J
13 JANUARY 2006

B

Evidence — Adverse inference — Failure of prosecution to call informer as witness — Prosecution discharged burden even without calling informer to testify — Whether evidence of informer was unnecessary to prosecution's case — Whether adverse inference applied

C

Evidence — Agent provocateur — Whether informer was agent provocateur — Whether played active role in commission of offence — Whether informer was agent provocateur and legally competent to be a witness — Whether evidence of informer was unnecessary to prosecution's case — Dangerous Drugs Act 1952 ss 40 & 40A

D

Evidence — Cross-examination — Failure to do so to be treated as acceptance of evidence — Prosecution failed to cross examine defence witness and put its version of events to him — Whether evidence of witness treated as accepted

E *Evidence — Hearsay — Effect of admission of hearsay evidence — Whether evidence that conversation took place between witnesses was relevant to prove defence — How such hearsay evidence ought to be treated*

Evidence — Hearsay — Oral hearsay — Effect of admission of hearsay evidence —
F *Whether evidence that conversation took place between witnesses was relevant to prove defence — How such hearsay evidence ought to be treated*

Evidence — Informer — Failure to call informer as witness — Whether informer played active role in commission of offence — Whether informer was agent provocateur and
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Evidence — Presumption — Drug trafficking — Whether presumption applied

H *Evidence — Witness — Informer — Whether informer was agent provocateur — Whether played active role in commission of offence — Whether informer was agent provocateur and legally competent to be a witness — Whether evidence of informer was unnecessary to prosecution's case — Dangerous Drugs Act 1952 ss 40 & 40A*

I

The accused was charged with trafficking in dangerous drugs. PW6, a chief inspector from the Narcotics Department, was the agent provocateur who with the assistance of the informer obtained the dangerous drugs from the accused. At the close of the case for the prosecution, the defence made a submission of no case to answer.

The main argument advanced was that the informer had lost the protection afforded to him, as he had played an active role in the transaction thereby becoming an agent provocateur. It was contended that since his evidence was vital to the narration of the case for the prosecution, he ought to have been called as a witness. The issue was whether the failure by the prosecution to call the informer as a witness at this stage of its case, or to have at least offered him to the defence, was fatal.

In his defence, the accused submitted that that the informer was Ah Li who had borrowed RM10,000 from him, which the accused had in turn borrowed from PW9. The defence submitted that Ah Li had failed to repay. However PW9 denied giving the loan. The accused said he was asked by Ah Li to put the two plastic bags in PW6's car where he was immediately arrested by PW7. He denied knowing that one of the bags contained ecstasy pills. It was the evidence of DW2 that she had heard a conversation between PW9 and the accused's counsel about the loan. The prosecution argued that the evidence of DW2 on what she had heard about the loan was hearsay and was therefore inadmissible.

Held, acquitting and discharging the accussed:

(1) The question of whether a person is an informer or an agent provocateur is one that depends upon the role played by that person in all the circumstances of the particular case: *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 and *Lee Lee Chong v Public Prosecutor* [1998] 4 MLJ 697 followed (see p 7). The part played by the informer in this case was beyond that of one who merely supplied information. He had participated in the commission of the offence as he had played an active role in the transaction between PW6 and the accused. He was therefore an agent provocateur. Accordingly, he lost the protection afforded by s 40(1) of the Dangerous Drugs Act 1952 and was legally competent to be a witness (see para 8).

(2) An adverse inference cannot be drawn for failure to call a witness when the prosecution has discharged its burden even without calling him to testify. In such a position, it is also not necessary for the prosecution to offer such a witness to the defence. It must, however, be observed that the failure to call a material witness even though his evidence may not be necessary, at the close of the case for the prosecution is a perilous course to be adopted. His evidence may assume significance and turn out to be crucial to resolve a doubt or to negate a particular point at the end of the case for the defence. In that event, the failure to have called him as a witness will be fatal even at that stage (see para 9).

(3) The evidence of PW6 and PW7 showed that the accused delivered the two plastic bags, one of which contained the ecstasy pills to PW6. Therefore, he had custody of the two bags. He also had knowledge that the bag contained ecstasy pills. It followed that the accused was in possession of the drugs. As the weight of the drugs was more than 50g the presumption of trafficking was activated. This evidence was sufficient to hold that the prosecution had made out a prima facie case of trafficking against the accused. The evidence of the informer was therefore unnecessary to unfold the narrative of the prosecution

case; at least at this stage. Thus it was also not necessary to have offered him to the defence. Accordingly, the accused was called to enter his defence (see para 10).

(4) The evidence of a statement made by a person who is not himself called as a witness is not hearsay if it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. It is admissible if it is relevant. It was obvious that the evidence of DW2 on the conversation regarding the loan cannot be used to establish its truth as she was only testifying on what she had heard. Thus her evidence could only establish that the conversation took place. Its truth would arise for consideration only after it had been established that it did in fact take place. That would be the subject matter of a different exercise. The fact that there was such a conversation on the loan was very relevant as it would go to the heart of the defence. It is a rule of evidence that if the conversation had not been brought to the attention of PW9 when he gave evidence then it will not be admissible: *Awadh Behari Sharma v State of Madya Pradesh* AIR 1956 SC 788 followed. This condition had been satisfied as PW9 when asked in his cross-examination denied that the conversation took place. DW2 had said that it did take place. The evidence of DW2 on the conversation between PW9 and learned counsel was therefore admissible in order to establish not its truth but whether the conversation did in fact take place (see para 13); *Subramaniam v Public Prosecutor* [1956] MLJ 220 followed.

(5) PW8 ought to have been recalled as a rebuttal witness by the prosecution to resolve the doubts regarding the loan. The failure to do so created gaps and doubts in the evidence of PW9. It must also be observed that the evidence of the accused on the loan that he had taken from PW9 must had been consistent with his statement to the police; if not his credit would have been impeached. In the circumstances, the court was unable to accept PW9 as a witness of truth (see para 13).

(6) The failure by the prosecution to have put its version of events to DW2 had therefore prejudiced the defence. As a matter of fact, the failure by the prosecution to have effectively cross-examined DW2 would amount to an acceptance of her testimony: *Ayoromi Helen v Public Prosecutor* [2005] 1 MLJ 699 followed. In the circumstances, the evidence of DW2 was accepted. This meant that there was in fact a conversation on the loan between PW9 and the counsel (see para 14); *Allied Pastoral Holdings Pty Ltd v Commissioner for Taxation* [1983] 1 NSWLR 1 followed.

(7) Since the conversation on the loan of RM10,000 to the accused by PW9 and the counsel did in fact take place, the defence advanced by the accused was not a concoction and was therefore probable. This could only be negated by the evidence of the informer (Ah Li) on the conversation that he was supposed to have had with the accused on the settlement of the loan as testified by the accused. The failure of the prosecution to have called the informer as a witness either in the course of its case or in rebuttal was thus fatal. The defence of the accused therefore remained unchallenged and had, consequently, raised a reasonable doubt in the case for the prosecution. The evidence of PW6 on the

role played by the accused must also be viewed against this background. The prosecution had therefore failed to prove its case against the accused beyond reasonable doubt (see para 15).

[Bahasa Malaysia summary

Tertuduh telah dituduh kerana mengedar dadah berbahaya. PW6, Cif Inspektor daripada Jabatan Narkotik, adalah ejen provocateur yang mana dengan bantuan pemberi maklumat telah mendapat dadah berbahaya daripada tertuduh. Di penutup kes pihak pendakwa, pihak pembela telah berhujah tiada kes untuk dijawab. Hujah utama yang dikemukakan adalah bahawa pemberi maklumat telah hilang perlindungan yang diberikan kepadanya, kerana beliau telah memainkan peranan aktif dalam transaksi tersebut dengan menjadi ejen provocateur. Adalah dihujahkan bahawa memandangkan keterangan beliau adalah penting kepada pengisahan kes bagi pihak pendakwa, beliau patut dipanggil sebagai saksi. Persoalan sama ada kegagalan oleh pihak pendakwa untuk memanggil pemberi maklumat sebagai saksi di peringkat ini dalam kesnya, atau sekurang-kurangnya menawarkan beliau kepada pihak pembela, adalah memudaratkan.

Dalam pembelaan beliau, tertuduh telah berhujah bahawa pemberi maklumat adalah Ah Li yang telah meminjam sebanyak RM10,000 daripada beliau, yang mana tertuduh kemudiannya telah meminjam daripada PW9. Pihak pembela berhujah bahawa Ah Li telah gagal untuk membayar balik. Namun, PW9 menafikan telah memberi pinjaman. Tertuduh berkata beliau telah diminta oleh Ah Li untuk meletakkan kedua-dua beg plastik ke dalam kereta PW6 di mana beliau ditangkap dengan serta merta oleh PW7. Beliau menafikan mengetahui bahawa salah satu daripada beg tersebut mengandungi pil-pil ekstasi.DW2 telah memberi keterangan bahawa beliau terdengar perbualan antara PW9 dan peguam tertuduh tentang pinjaman itu. Pihak pendakwa berhujah bahawa keterangan DW2 berhubung apa yang didengarnya tentang pinjaman itu adalah dengar cakap dan oleh itu tidak boleh diterima.]

Diputuskan, melepas dan membebaskan tertuduh:

(1) Persoalan sama ada seseorang itu adalah pemberi maklumat atau ejen provocateur bergantung kepada perana yang dimainkan olehnya dalam keadaan kes tertentu: *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 dan *Lee Lee Chong v Public Prosecutor* [1998] 4 MLJ 697 diikut (lihat perenggan 7). Peranan yang dimainkan oleh pemberi maklumat dalam kes ini adalah lebih daripada seseorang yang hanya memberi maklumat. Beliau telah terlibat dalam perlakuan kesalahan itu kerana beliau telah memainkan peranan aktif dalam transaksi antara PW6 dan tertuduh. Oleh itu beliau merupakan seorang ejen provocateur. Sewajarnya, beliau telah hilang perlindungan yang diberikan oleh s 40(1) Akta Dadah Berbahaya 1952 dan kompeten di sisi undang-undang untuk menjadi saksi (lihat perenggan 8).

(2) Inferens yang bertentangan tidak boleh diperoleh kerana kegagalan memanggil; saksi apabila pihak pendakwa melepaskan bebannya tanpa

memanggilnya untuk memberikan keterangan. Dalam keadaan begini, ia juga tidak perlu untuk pihak pendakwa menawarkan saksi kepada pihak pembela. Harus diteliti, bagaimanapun, yang kegagalan untuk memanggil saksi utama meskipun keterangannya tidak diperlukan, di penutup kes pihak pendakwa adalah jalan yang bahaya untuk diambil. Keterangan beliau mungkin dianggap penting dan menjadi penentu untuk menyelesaikan keraguan atau menyangkal perkara tertentu di akhir kes bagi pihak pembela. Dalam keadaan sedemikian, kegagaln untuk memanggil beliau sebagai saksi akan memudaratkan di peringkat itu (lihat perenggan 9).

(3) Keterangan PW6 dan PW7 menunjukkan bahawa tertuduh telah memberikan dua beg plastik, satu daripadanya mengandungi pil-pil ekstasi kepada PW6. Oleh itu, beliau mempunyai jagaan ke atas dua beg tersebut. Beliau juga mempunyai pengetahuan bahawa beg tersebut mengandungi pil-pil ekstasi. Oleh demikian tertuduh memiliki dadah tersebut. Memandangkan berat dadah tersebut melebihi 50g, andaian pengedaran wujud. Keterangan pemberi maklumat adalah memadai untuk memutuskan bahawa pihak pendakwa telah membuktikan kes prima facie pengedaran terhadap tertuduh. Keterangan pemberi maklumat oleh itu tidak diperlukan untuk membuktikan kes pihak pendakwa; sekurang-kurangnya di peringkat ini. Oleh itu tidaklah perlu untuk menawarkan beliau kepada pihak pembela. Sewajarnya, tertuduh telah dipanggil untuk memasuki pembelaan beliau (lihat perenggan 10).

(4) Keterangan suatu kenyataan yang dibuat oleh seseorang yang tidak dipanggil sebagai saksi bukanlah dengar cakap jika ia disarankan untuk dibuktikan dengan keterangan, bukan berhubung kebenaran kenyataan itu, tetapi fakta bahawa ia telah dibuat. Ia boleh diterima jika ianya relevan. Adalah jelas bahawa keterangan DW2 berhubung perbualan tentang pinjaman itu tidak boleh digunakan untuk membuktikan kebenarannya kerana beliau hanya memberikan keterangan tentang apa yang beliau dengar. Oleh itu keterangan beliau hanya boleh membuktikan bahawa perbualan itu telah berlaku. Kebenarannya akan timbul untuk dipertimbangkan hanya setelah ia telah dibuktikan bahawa ia sememangnya telah berlaku. Itu adalah perkara pokok yang menggunakan amalan lain. Hakikat bahawa terdapat perbualan tentang pinjaman amat relevan kerana ia membantu pihak pembela. Adalah satu rukun keterangan bahawa jika perbualan tersebut tidak dibawa ke perhatian PW9 apabila beliau memberi keterangan maka ia tidak boleh diterima: *Awadh Behari Sharma v State of Madya Pradesh* AIR 1956 SC 788 diikut. Syarat ini telah dipenuhi kerana PW9 apabila ditanya dalam pemeriksaan balas beliau telah menafikan bahawa perbualan tersebut telah berlaku. DW2 pula berkata ia telah berlaku. Keterangan DW2 tentang perbualan antara PW9 dan peguam bijaksana oleh itu boleh diterima bukan bagi tujuan membuktikan kebenarannya tetapi sama ada perbualan tersebut benar-benar berlaku (lihat perenggan 13); *Subramaniam v Public Prosecutor* [1956] MLJ 220 diikut.

(5) PW8 sepatutnya dipanggil balik sebagai saksi pematahan oleh pihak pendakwa untuk menyelesaikan keraguan berhubung pinjaman tersebut. Kegagalan untuk berbuat demikian membentuk jurang dan keraguan dalam keterangan. Ia juga harus diteliti bahawa keterangan tertuduh berhubung pinjaman tersebut yang telah diambil oleh beliau daripada PW9 hendaklah konsisten

dengan kenyataan beliau kepada polis; jika tidak kebolehpercayaan beliau akan dicabar. Dalam keadaan sedemikian, mahkamah tidak dapat menerima PW9 sebagai saksi yang boleh dipercayai (lihat perenggan 13).

(6) Kegagalan pihak pendakwa untuk mengemukakan versinya berhubung kejadian kepada DW2 telah memprejudiskan pihak pembela. Bahkan, kegagalan pihak pendakwa untuk memeriksa balas DW2 membentuk penerimaan keterangannya: *Ayoromi Helen v Public Prosecutor* [2005] 1 MLJ 699 diikut. Dalam keadaan berikut, keterangan DW2 diterima. Ini bermakna sememangnya terdapat perbualan tentang pinjaman antara PW9 dan peguam itu (lihat perenggan 14); *Allied Pastoral Holdings Pty Ltd v Commissioner for Taxation* [1983] 1 NSWLR 1 diikut.

(7) Memandangkan perbualan tentang pinjaman RM10,000 kepada tertuduh oleh PW9 dan peguam itu memang berlaku, pembelaan yang dikemukakan oleh tertuduh itu bukan suatu rekaan dan oleh itu berkemungkinan. Ini hanya boleh disangkal oleh keterangan pemberi maklumat (Ah Li) berhubung perbualan yang sepatutnya beliau ada dengan tertuduh tentang penyelesaian pinjaman sepertimana yang diberi keterangan oleh tertuduh. Kegagalan pihak pendakwa untuk memanggil pemberi maklumat sebagai saksi sama ada semasa kesnya berjalan atau semasa pematahan adalah memudaratkan. Pembelaan tertuduh oleh itu masih tidak dicabar dan telah, berikutan itu, menimbulkan keraguan dalam kes terhadap pihak pendakwa. Keterangan PW6 berhubung peranan yang dimainkan oleh tertuduh juga dilihat berdasarkan latar belakang ini. Pihak pendakwa oleh itu telah gagal untuk membuktikan kesnya terhadap tertuduh melampaui keraguan munasabah (lihat perenggan 15).

Notes

For a case on effect of admission of hearsay evidence, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1546.

For a case on failure to call informer as witness, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1033.

For a case on failure to cross examined be treated as acceptance of evidence, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1033.

For a case on failure of prosecution to call informer as witness, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 124.

For cases on informer, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2588, 2619–2620.

For a case on oral hearsay, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1569.

For cases on presumption of drug trafficking, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1954–1957.

For a case on whether informer was an agent provocateur, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 255.

Cases referred to

Allied Pastoral Holdings Pty Ltd v Commissioner for Taxation (1983) 1 NSWLR 1 (folld)

Awadh Behari Sharma v State of Madya Pradesh AIR 1956 SC 788 (folld)

Ayoromi Helen v PP [2005] 1 MLJ 699 (folld)

Lee Lee Chong v PP [1998] 4 MLJ 697 (folld)

Munusamy v PP [1987] 1 MLJ 492 (folld)
PP v Chia Leong Foo [2000] 6 MLJ 705 (refd)
Teja Singh & Mohamed Nasir v PP [1950] MLJ 71 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433 (refd)
Ratten v R (1972) AC 378 (refd)
Subramaniam v PP [1956] MLJ 220 (folld)

Legislation referred to
Dangerous Drugs Act 1952 ss 40(1), 40A

Appeal from: Arrest Case No C81–8 of 2001 (Magistrates' Court, Kuala Lumpur)

Shalyza Alis bte Sharkawi (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Gurbachan Singh (Bachan & Kartar) for the accused.

Augustine Paul J:

[1] The charge preferred against the accused is one for trafficking in dangerous drugs. It reads as follows:

> Bahawa kamu pada 30 April 2001, jam lebih kurang 5.15 petang di kawasan tempat letak kereta Jaya Jusco, Taman Maluri, dalam daerah Cheras, dalam Wilayah Persekutuan Kuala Lumpur, telah mengedar dadah berbahaya iaitu 599.6g 3.4 — Methylenedioxymethamphetamine (MDMA), oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama.

He claimed trial to the charge. The prosecution called eight witnesses in support of its case.

[2] They are Detective Sergeant Nurazlina (PW1), police exhibit store supervisor; Corporal Harman bin Jamaluddin (PW2), a police photographer; Mohan a/l KP Gengadharan (PW3), a chemist from the Chemistry Department; Inspector Mohd Roslan bin Omar (PW4), from the Criminal Records Office of Police Headquarters; Assistant Superintendent of Police Mohd Yunus bin Hj Mohamed (PW5), Head of the Narcotics Department of Kedah Police; Chief Inspector Chia Aik Chin (PW6), from the Narcotics Department of Selangor Police; Inspector Ismail bin Daud (PW7), from the Narcotics Department of Kedah Police and Inspector Woon Khoon Ming (PW8), from the Narcotics Department of Cheras Police and the investigation officer in this case. When the defence was called the accused (DW1) elected to give evidence on oath. He was the only witness for the defence. At the close of his testimony the prosecution called Lim Kok Leng (PW9) to give evidence in rebuttal while the defence called Lim Sheng Hwa (DW2) as a surrebuttal witness.

[3] In April 2001, PW5 received some information about drug trafficking activities. As he said in his examination-in-chief:

Pada 29 April 2001, saya ada terlibat dalam satu operasi berkaitan dengan dadah. Dalam operasi itu saya terlibat dalam merancang satu operasi berkaitan dengan satu pengedaran dadah. Pada petang hari itu saya menerima maklumat daripada pegawai saya mengenai ada satu sindiket untuk mengedar dadah pil jenis ecstasy yang dijangka berlaku di sekitar Kuala Lumpur pada 30 April 2001. Ekoran dari itu saya telah mengaturkan beberapa orang pegawai dan anggota dari kontingen Kedah untuk pergi ke Kuala Lumpur. Saya bersama Chief Inspector Ismail, Det/Kpl Ali, Det/Kpl Salim dan Det/Kpl Jamil bergerak ke Kuala Lumpur pada petang 29hb dari Kedah. Selepas itu saya berhubung dengan C/Insp Chia dari Jabatan Narkotik Kontingen Selangor untuk membantu saya membuat operasi yang saya rancang pada 30hb. Pada 30hb petang saya juga berhubung dengan Jabatan Narkotik Kuala Lumpur untuk dapatkan bantuan tenaga pegawai dan anggota membantu saya. Saya telah membuat satu taklimat operasi di kawasan letak kereta Hospital Universiti Kebangsaan Malaysia, Jalan Cheras. Pada jam lebih kurang 4.00 petang 30 April 2001 pegawai dan anggota yang hadir taklimat di tempat itu terdiri daripada tiga C/Insp iaitu Ismail, Song Chai dan Chia dan enam orang pegawai pangkat rendah. Anggota detektif dari Kuala Lumpur terdiri daripada D/Sjn Major Teoh, D/Sjn Baharuddin, D/Kpl Ramli dan termasuk tiga orang dari Kedah yang saya sebut dahulu. (C/Insp Ismail, Song Chai, Chia dan enam pegawai polis rendah dicamkan)

Di dalam taklimat, saya nyatakan satu transaksi pengedaran dadah jenis pil ecstasy dijangka akan dilakukan oleh seorang pengedar di kawasan kompleks Beli-Belah Jaya Jusco, Taman Maluri, Cheras. Saya telah menggunakan C/Insp Chia untuk berjumpa dengan seorang pengedar yang hanya dikenali 'Panjang', seorang lelaki Cina. Maklumat ini saya terima daripada sumber berdaftar. Transaksi ini dijangka berlaku dalam pukul 5.00 petang di kawasan tempat letak kereta Jaya Jusco. Saya telah mengaturkan peranan tugas tiap-tiap pegawai terutama memberi tumpuan kepada kedudukan dan pergerakan C/Insp Chia. Selepas taklimat anggota mengambil tempat termasuk kawasan membeli-belah dan juga jalan masuk dan keluar tempat letak kereta di Kompleks Jaya Jusco. Pada petang tersebut jam lebih kurang 5.45 petang saya dimaklumkan kumpulan saya telah menangkap seorang lelaki Cina yang mana lelaki Cina itu telah meletakkan dadah tersebut dalam sebuah kereta. Dalam taklimat C/Insp Chia telah saya arahkan untuk bertindak mendapatkan bekalan dadah daripada 'Panjang'. Maklumat yang saya beri C/Insp Chia ialah sebanyak lebih kurang 5,000 biji pil dadah ecstasy akan diedarkan oleh lelaki Cina bernama 'Panjang'. Mengikut maklumat harga pil-pil ini ialah RM19 bagi satu biji. Pembayaran akan dibuat oleh C/Insp Chia. C/Insp Chia ada saya perkenalkan kepada sumber berdaftar selepas saya memberi taklimat kepada kumpulan yang besar.

In his cross-examination, he said:

Saya suruh C/Insp Chia menunggu sebagaimana perbincangan yang dibuat oleh sumber dengan Panjang. Menunggu di kawasan sekitar hadapan tempat letak kereta Jaya Jusco. Dalam operasi satu kenderaan polis juga digunakan. Kereta itu ialah Perodua Kancil. Saya tidak setuju bahawa C/Insp Chia sepatutnya menunggu di kereta Kancil ini. Saya tidak tahu sama ada Panjang dikenali sebagai Ali juga. Transaksi berlaku dengan Panjang dan C/Insp Chia sahaja. Perbincangan berlaku di antara Panjang dan sumber berdaftar. Hasil perbincangan ini barulah C/Insp Chia dapat membuat tangkapan. Saya sendiri tidak beri nama samaran kepada C/Insp Chia. Ini di antara sumber berdaftar dan C/Insp Chia sahaja. Tidak ada anggota sokongan yang lain di tempat itu selain daripada yang hadir di taklimat. Anggota saya menggunakan walkie-talkie dan handphone masing-masing. Isyarat diberi oleh Insp Chia. Ini tidak ditaklimat oleh saya. Di dalam kawasan Kompleks Jaya Jusco saya bahagikan kepada dua kumpulan; sebahagian di luar dan sebahagian di dalam. Tetapi mereka bergerak bukan statik. Sekurang-kurangnya ada 4 orang di dalam kompleks. Di luar ada enam orang termasuk saya. Kita tunggu di sana lebih kurang satu jam. Bila tangkapan berlaku saya masih berada di sana. Saya setuju sumber berdaftar meninggal selepas tangkapan dibuat. Saya tidak setuju bahawa perangkap diatur oleh

sumber berdaftar. Saya setuju C/Insp Chia cuma menangkap Panjang berhampiran kereta Kancil. Saya setuju sumber berdaftar telah melakukan rundingan dengan Panjang sebelum tangkapan. Saya tidak nampak tangkapan. Saya bergerak dari dalam dan luar. Ada suatu ketika sahaja saya nampak Panjang dan sumber berdaftar bersama di suatu tempat di dalam kawasan kompleks.

PW6 played a crucial role in the arrest of the accused. He acted as an agent provocateur in obtaining the dangerous drugs from the accused. As he said in his examination-in-chief:

Pada 29 April 2001, saya diarahkan oleh Supt Yunus untuk menjalankan satu tugas khas. Pada 29 April 2001 jam lebih kurang 11.00 malam saya telah dihubungi oleh Supt Yunus supaya bersiap sedia pada 30 April 2001 kerana ada tugas khas. Pada 30 April 2001 jam lebih kurang 2.00 petang saya telah diarahkan oleh Supt Yunus supaya saya melaporkan kepadanya di kawasan parking Hospital UKM Cheras. Pada jam lebih kurang 4.00 petang saya sampai di Hospital UKM dan selepas itu Supt Yunus telah taklimatkan tugas-tugas yang hendak dilakukan oleh saya iaitu menjadi undercover dalam satu jual-beli dadah jenis ecstasy. Selepas taklimat selesai saya dibawa oleh Supt Yunus berjumpa dengan sumbernya. Supt Yunus taklimatkan kepada saya dan sumbernya apakah tugas yang hendak dilakukan oleh saya iaitu sebagai menerima dadah jenis ecstasy daripada seorang pembekal iaitu satu lelaki Cina yang dikenali sebagai Panjang. Selepas itu Supt Yunus telah serahkan satu beg sling yang mengandungi flash money dan kunci kereta jenis Kancil. Dan diarahkan membawa sumber itu ke Jaya Jusco, Taman Maluri, Cheras. Pada jam lebih kurang 5.00 petang saya bersama sumber sampai di Jaya Jusco dan saya meletakkan kereta Kancil No KVA 6419 di kawasan tempat letak kereta di hadapan Jaya Jusco. Selepas itu sumber telah pergi ke KFC dan saya menunggu d dalam kereta. Pada jam lebih kurang 5.20 petang saya dihubungi oleh sumber melalui telefon supaya pergi ke KFC. Di sana saya telah diperkenalkan kepada satu lelaki Cina yang dikenali sebagai Panjang. Selepas itu sumber memberitahu saya ikut lelaki Cina tersebut untuk menerima bekalan ecstasy yang berjumlah 5,000 biji. Kemudian saya telah ikut lelaki Cina tersebut dan dia arahkan saya supaya pergi ke tingkat atas tempat letak kereta untuk menerima pil tersebut. Tetapi saya tidak berbuat demikian kerana saya beritahu lelaki Cina tersebut saya mahu menerima bekalan tersebut di kawasan berhampiran kereta saya. Akhirnya lelaki Cina itu telah setuju untuk hantar bekalan tersebut kepada saya ke kawasan di mana kereta saya di parking. Lelaki Cina tersebut telah masuk ke dalam pasaraya Jaya Jusco dan saya menunggu di kereta di mana saya letakkan kereta. Pada jam lebih kurang 5.45 petang saya nampak lelaki Cina itu berjalan keluar dari pasaraya Jaya Jusco dan menuju ke arah saya dan di tangan kanannya ada memegang dua beg plastik dan telah berjumpa dengan saya dan tanya di mana wang. Saya beritahu lelaki Cina saya hendak lihat dan sahkan pil tersebut tetapi tidak dibenarkan olehnya dengan alasan tempat itu tidak sesuai kerana ada orang yang lalu lalang di situ. Selepas itu saya pun ambil kunci kereta dan tekan alarm button dengan alasan untuk mengeluarkan wang dari boot kereta. Pada masa yang sama lelaki Cina tersebut telah membuka pintu kereta Kancil bahagian hadapan sebelah kiri dan meletakkan dua bungkusan plastik tersebut di atas cushion kereta. Pada masa yang sama pasukan serbuan yang diketuai oleh C/Insp Ismail dan Kpl Ali telah menahan lelaki Cina tersebut berhampiran kereta tersebut. C/Insp Ismail dan Kpl Ali dicamkan.

Semasa saya hadir taklimat di kawasan parking hospital UKM selain daripada Supt Yunus terdapat orang lain yang hadir. Mereka ialah C/Insp Ismail, C/Insp Som Chai, Sub-Insp Teoh, Sjn Baharuddin, Kpl Ramli, Kpl Jamil, Kpl Ali dan L/Kpl Mohd Salim — dicamkan. Lelaki Cina yang dikenali sebagai Panjang ada di Mahkamah — tertuduh dicamkan. Semasa OKT ditahan dia cuba untuk melarikan diri. Selepas OKT ditangkap oleh C/Insp Ismail dan Kpl Ali, Insp Som Chai dan Sub-Insp Teoh datang membantu dalam tangkapan itu. Selepas tangkapan dibuat OKT telah dibawa ke kereta Kancil dan saya telah serahkan kunci kereta kepada Insp Ismail. Dia telah buat pemeriksaan di dalam kereta dan jumpai dua

bungkusan plastik di atas tempat duduk hadapan bahagian penumpang. C/Insp Ismail telah buat pemeriksan pada bungkusan beg plastik itu dan dapati satu beg plastik di dalamnya dua botol air mineral jenama Spritzer dan satu bungkusan plastik lagi di dalamnya ada satu sampul surat yang mengandungi lima bungkusan plastik lutsinar berisi pil-pil warna biru disyaki pil ecstasy. Saya ada menyaksikan pemeriksaan. (Saksi dirujuk kepada P11B) Pil-pil macam ini. (Saksi dirujuk kepada P9 A dan B) Inilah kereta Kancil yang saya maksudkan. OKT ialah lelaki Cina yang sama yang diperkenalkan kepada saya oleh sumber. Dua beg plastik yang dirampas oleh C/Insp Ismail merupakan beg plastik yang diletakkan oleh OKT. Dari masa beg plastik itu diletakkan di dalam kereta Kancil oleh OKT sehingga C/Insp Ismail menjalankan pemeriksaan ke atas beg itu beg itu sentiasa berada dalam pandangan saya.

In his cross-examination, he said:

Di dalam operasi menggunakan sumber dan agen nama samaran adalah perlu. Dalam kes ini saya tiada nama samaran. Sumber pun tiada nama samaran. Saya telah diperkenalkan kepada sumber pada hari tangkapan. Sebelum itu saya tidak pernah jumpa sumber. Sumber berbangsa Cina. Sumber berdaftar maksudnya boleh dikesan oleh polis. Terdapat sumber lain yang tidak berdaftar. Sumber tidak berdaftar tidak boleh dikesan. Selepas diperkenalkan kepada sumber berdaftar oleh SP5 saya dan sumber berdaftar datang ke pasaraya Jaya Jusco dengan menaiki kereta Kancil. Kereta itu diserahkan kepada saya oleh SP5 di kawasan parking Hospital UKM Cheras. Sebelum itu saya tidak pernah memandu atau menjaga kereta Kancil. Semasa diserahkan kereta Kancil itu sumber berdaftar telah berada di kawasan itu. Setelah kereta Kancil diserah pada saya taklimat yang diberikan oleh SP5 telah selesai. Saya juga hadir dalam taklimat. Sepatutnya C/Insp Ismail dan D/Kpl Ali berada di luar kawasan kompleks Jaya Jusco. Di dalam kawasan parking.

Semasa sampai di kompleks Jaya Jusco saya tidak masuk ke kompleks bersama sumber. Saya tidak nampak bila OKT masuk ke kompleks Jaya Jusco. Saya diserahkan dengan flash money oleh SP5. Sebanyak RM95,000. Tiada akuan penerimaan duit ini dikeluarkan. This is real money. Beg sling saya tidak berapa besar. Beg itu ialah beg canvass. Warna tak ingat. Apabila sampai di kompleks Jaya Jusco sumber masuk seorang diri. Saya hanya masuk ke dalam kompleks selepas terima panggilan daripada sumber. Panggilan dibuat melalui handphone. Setelah dipanggil oleh sumber saya masuk dalam kompleks dan terus menuju ke KFC. Bila sampai ke KFC itulah kali pertama saya nampak OKT. Saya tak pasti sama ada KFC berhampiran dengan McDonald. KFC berada di sebelah kanan pintu utama Kompleks Jaya Jusco. Saya masuk melalui pintu kecil berhampiran KFC. (Saksi dirujuk kepada P10B) P10A ialah pintu utama. Tanda di P10B menunjukkan McDonald.

Kali kedua saya jumpa OKT ialah di kawasan parking. Pintu Kancil dibuka dengan remote oleh saya apabila OKT telah hampir dengan kereta Kancil. Pintu Kancil dibuka oleh OKT sendiri. Semasa itu saya pergi ke boot Kancil. OKT membawa dua beg plastik. Saya tidak setuju jika dikatakan saya tidak meminta OKT menunjukkan barang sebelum membuka pintu Kancil. Saya nampak tangkapan dibuat. Saya cuma memerhatikan tangkapan yang dibuat. Tangkapan dibuat lebih kurang 10 kaki dari Kancil. Selepas tangkapan dibuat oleh C/Insp Ismail dan D/Kpl Ali saya nampak badan OKT diperiksa. OKT dibawa ke Kancil dalam masa 1–2 minit selepas tangkapan dibuat. Setelah OKT dibawa ke Kancil sebahagian besar anggota pasukan operasi telah berada di sekeliling kereta Kancil. Saya tidak nampak sumber keluar. Semasa ditangkap OKT sebenarnya telah mula meninggalkan kereta Kancil tersebut. Peranan sumber ialah untuk negotiate dengan OKT. Saya tidak pasti sama ada sumber telah berunding dengan OKT. Saya cuma diperkenalkan oleh sumber kepada OKT di KFC. Apa yang berlaku di antara sumber dan OKT saya tidak tahu kerana saya ada di kawasan parking. Saya tidak diperkenalkan kepada OKT oleh sumber sebagai kenalan sumber. Saya tidak setuju jika dicadangkan sumber telah memperkenalkan saya kepada OKT sebagai seorang kenalan sumber. Saya tidak setuju jika dikatakan OKT tidak pernah

bertanya tentang wang pada saya. Saya tidak setuju jika dikatakan semasa saya berjumpa OKT kali kedua di kawasan parking OKT katakan kepada saya beliau menghantar barang yang diberikan oleh sumber. OKT tidak bawa keropok. Hanya dua botol mineral water. Apabila diperkenalkan kepada OKT sumber hanya kata 'ini orang saya'. Saya tak setuju saya diperkenalkan sebagai Ah Wai. Saya setuju saya tidak tahu apa yang ada di dalam kereta Kancil sebelum saya pandu. Saya tak setuju saya tidak nampak di mana OKT letakkan dua beg plastik itu. Saya tidak setuju jika dikatakan saya tidak nampak kerana ketika itu saya berada di bahagian boot kereta Kancil.

PW7 is the officer who arrested the accused. As he said in his examination-in-chief:

Pada 30 April 2001, saya telah mengetuai sepasukan pegawai dan anggota narkotik untuk membuat serang hendap di kawasan tempat letak kereta Jaya Jusco, Cheras. Pegawai dan anggota terdiri dari K/Insp Soom Cai, Sjn Baharuddin, Kpl Jamil, Kpl Salim, Kpl Ali dan Det/L/Kpl Ramli — dicamkan. Sub Insp Teoh sebagai jurubahasa — dicamkan.

Pemerhatian mula dijalankan pada jam 5.15 petang. Serbuan dijalankan pada jam 5.45 petang. Pada jam 5.45 petang semasa saya dan anggota dalam kedudukan serang hendap di kawasan tempat letak kereta Jaya Jusco, Cheras saya telah nampak seorang lelaki Cina iaitu sasaran dalam kes ini telah keluar dari pintu besar Jaya Jusco. Semasa keluar lelaki ini membawa dua beg plastik warna putih dipegang dengan menggunakan tangan kanan berjalan menuju ke arah kawasan parking. Saya terus memerhatikan pergerakan lelaki ini dan dia menuju ke arah sebuah kereta Kancil KVA 6419 yang diletak di kawasan letak kereta. Apabila sampai berhampiran kereta tersebut, saya nampak lelaki ini telah bercakap dengan seorang lelaki Cina iaitu K/Insp Chia yang bertindak sebagai ejen provocateur. Selepas itu saya nampak K/Insp Chia bergerak ke arah belakang kereta Kancil. Pada masa itu, lelaki Cina itu berada berhampiran pintu sebelah kiri kereta Kancil. Apabila K/Insp Chia buka pintu belakang kereta tersebut pada masa yang sama juga lelaki Cina itu telah membuka pintu bahagian kiri kereta Kancil dan memasukkan kedua bungkusan yang dibawa ke dalam kereta. Pada masa itu, saya dan Kpl Ali yang berada berhampiran bergerak mendekati lelaki Cina itu. Apabila saya sampai dekat lelaki Cina itu dia telah terpandang ke arah saya dan Kpl Ali. Dia cuba melarikan diri dari tempat tersebut. Kemudian saya dan Kpl Ali terus menerpa ke arah lelaki Cina tersebut dan berjaya menahan dia dari jarak 10 kaki dari kenderaan Kancil. Lelaki Cina itu ada di mahkamah — OKT dicamkan. K/Insp Chia dicamkan.

In his cross-examination, he said:

Saya setuju semasa tangkapan dibuat ada seorang sumber di kawasan persekitaran Jaya Jusco. Sumber itu bukan lelaki Cina. Saya tidak nampak apa yang dilakukan oleh sumber ini. OKT hanya jumpa ejen provocateur dan bukan sumber.

[4] PW8 sent the exhibits that were seized to the Chemistry Department for analysis. PW3 confirmed that they contained 599.6g of 3.4 Methylenedioxymethamphetamine (MDMA).

[5] At the close of the case for the prosecution, the defence made a submission of no case to answer. The main argument advanced was that the informer had lost the protection afforded to him, as he had played an active role in the transaction thereby becoming an agent provocateur. It was contended that since his evidence was vital to the narration of the case for the prosecution he ought to have been called as a witness.

[6] In considering the validity of this submission, it is necessary to deliberate on the legal position of an informer and an agent provocateur. *Black's Law Dictionary* (6th Ed) defines an 'informer' as:

> An undisclosed person who confidentially discloses material information of a law violation, thereby supplying a lead to officers for their investigation of a crime. *Jackson v State* Wyo 522 P2d1286, at p 1288.

Criminal Pleading, Evidence and Practice by Archbold (41st Ed) defines an 'agent provocateur' at pp 15–74 as:

> A person who entices another to commit an express breach of the law which he would not otherwise have committed and then proceeds to inform against him in respect of such an offence.

Thus while an informer merely supplies information regarding an offence without taking part in it, an agent provocateur participates in the commission of the offence. It follows that there is a clear distinction in the legal position of an informer and an agent provocateur. Section 40(1) of the Dangerous Drugs Act 1952 ('the Act') protects the identity of an informer from disclosure. It reads as follows:

> Except as hereinafter provided, no complaint as to an offence under this Act shall be admitted in evidence in any civil or criminal proceeding whatsoever, and no witness shall be obliged or permitted to disclose the name or address of any informer, or state any matter which might lead to his discovery.

It must be observed that s 40A of the Act provides that the evidence of agent provocateurs is admissible. It reads as follows:

> (1) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.
>
> (2) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, and that the agent provocateur is a police officer whatever his rank or any officer of customs, any statement, whether oral or in writing made to an agent provocateur or by any person who subsequently is charged with an offence under this Act shall be admissible as evidence at his trial.

[7] The protection of the identity of an informer by s 40 of the Act means that he is under no legal obligation to give evidence unlike an agent provocateur who enjoys no such protection. Thus s 40A provides that his evidence shall not be presumed to be unworthy of credit in the circumstances prescribed therein. He is not an accomplice and his evidence does not require corroboration (see *Teja Singh & Mohamed Nasir v Public Prosecutor* [1950] MLJ 71). The question of whether a person is an informer or an agent provocateur is one that depends upon the role played by that person in all the circumstances of the particular case (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433; *Lee Lee Chong v Public Prosecutor* [1998] 4 MLJ 697).

[8] The status of the informer in this case therefore depends on the role that he had played in the transaction. The evidence reveals that PW5 obtained information about 'Panjang' (the accused) from the informer. He then gave a briefing to his officers. He told them of the duty of PW6 to collect the drugs from the accused. PW6 was then handed the money and the keys to a Kancil car. PW5 then introduced the informer to PW6 and instructed him to take the informer to Jaya Jusco, Taman Maluri, Cheras. At about 5pm, PW6 and the informer arrived at Jaya Jusco. PW6 parked the Kancil car at the carpark. The informer then went into the KFC outlet while PW6 waited in the car. At about 5.20pm, the informer called PW6 on his handphone and asked him to come to KFC. There he was introduced to the accused by the informer who told him, 'Ini orang saya'. PW6 said that the role of the informer was to negotiate with the accused. The informer told PW6 to follow the accused and collect 5,000 ecstasy pills from him. PW6 then followed the accused. Clearly, the part played by the informer is beyond that of one who merely supplied information. He had participated in the commission of the offence as he had played an active role in the transaction between PW6 and the accused. He is therefore an agent provocateur. Accordingly, he loses the protection afforded by s 40(1) of the Act and is legally competent to be a witness.

[9] The informer is indeed a material witness in the case for the prosecution. The question that requires to be addressed is whether the failure by the prosecution to have called him as a witness at this stage of its case, or to have at least offered him to the defence, is fatal. I have dealt with the duty of the prosecution to call witnesses exhaustively in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705. Shortly stated, the position is that the prosecution has a discretion as to whether or not to call a particular witness. However, the prosecution is obliged to call as witnesses persons whose evidence is essential to unfold the narrative upon which its case is based. Thus, the question to be asked where there is a failure to call a particular witness is whether the prosecution has proved its case even without calling that witness. An adverse inference cannot be drawn for failure to call a witness when the prosecution has discharged its burden even without calling him to testify. In such a position, it is also not necessary for the prosecution to offer such a witness to the defence. It must, however, be observed that the failure to call a material witness even though his evidence may not be necessary at the close of the case for the prosecution is a perilous course to be adopted. His evidence may assume significance and turn out to be crucial to resolve a doubt or to negate a particular point at the end of the case for the defence. In that event the failure to have called him as a witness will be fatal even at that stage.

[10] It follows that in order to determine whether the failure by the prosecution to have called the informer as a witness is fatal it must first be ascertained whether the prosecution has proved its case even without his evidence. The case against the accused rests essentially on the evidence of PW6. When PW6 went into KFC he was introduced to the accused by the informer. He was asked to follow the accused who will give him 5,000 ecstasy pills. PW6 followed the accused who asked him to go to the upstairs carpark to collect the pills. But PW6 told him that he wanted to collect the pills near his car. The accused agreed to deliver the pills there. The accused then went into KFC while PW6 waited near his car. Later, PW6 saw the accused coming

towards him with two plastic bags. When he came to the accused he asked for the money. The accused refused to allow PW6 to check the pills as there were other people around there. PW6 then opened his car boot saying that he wanted to take out the money from there. At the same time the accused opened the front door of the Kancil car and placed the two plastic bags on the cushion. PW7 saw the accused placing the two plastic bags inside the car and walked towards the accused who tried to run from there. He was arrested. PW7 found the two plastic bags in the car. One bag contained two mineral water bottles. The other bag contained the ecstasy pills. The evidence of PW6 and PW7 show that the accused delivered the two plastic bags to PW6. Therefore, he had custody of the two bags. He also had knowledge that the bag contained ecstasy pills. It follows that the accused was in possession of the drugs. As the weight of the drugs is more than 50g, the presumption of trafficking is activated. This evidence is sufficient to hold that the prosecution had made out a prima facie case of trafficking against the accused. The evidence of the informer is therefore unnecessary to unfold the narrative of the prosecution case; at least at this stage. Thus, it is also not necessary to have offered him to the defence. The submission of the defence cannot therefore be sustained. Accordingly, I called upon the accused to enter his defence.

[11] The accused elected to give evidence on oath. In his evidence, he said that the informer is Ah Li, a good friend of his. In June 2000, Ah Li had borrowed RM10,000 from him. The accused had taken this sum of money from a person called KL Lim. It was subject to interest of RM500 per month. Ah Li had agreed to pay this interest which he paid but stopped paying after three months. The accused then asked Ah Li to repay the principal and the interest which he did not. As the accused said further in his examination-in-chief:

> On 30 April 2001 at about 2pm, Ah Li telephoned me. He called me through the handphone. He asked me whether I was free. I told him yes. He asked me to go to KFC at Jaya Jusco at about 4–5pm. He told me that he will pay back the money. I went to KFC at about 5pm. I was on leave as I had an injury on my left hand. I got it when I was working. So I did not work from early April. When I reached there, I went to KFC. I saw Ah Li having a meal there. When I went there, I did not carry anything. I was seated in front of him. I also had a meal. Nobody came to our table until Ah Li telephoned someone. I do not know when he called. Then a Chinese male came to our table. I had not seen him before. I had also not spoken to him before. He gave evidence in this court. He is Insp Chia. Ah Li introduced Insp Chia to me and told me that he is his friend. He called Insp Chia Ah Wai. He introduced me to Ah Wai as Panjang. Then Ah Li told Ah Wai that I was his good friend. Ah Li also told Ah Wai that I had worked for him. Ah Wai also had a meal with us. Then I saw Ah Li making a call and asking that person to come quick and bring something. I do not know when he called. After the phone call, Ah Li told me that the person's name is Steven. I was introduced to Steven in the year 2000 in a disco. (Witness referred to evidence of Insp Chia 'selepas itu sumber memberi tahu saya ikut lelaki Cina tersebut untuk menerima bekalan ecstasy yang berjumlah 5,000 biji.') The sumber is Ah Li. Ah Li did not tell this to Insp Chia in my presence. On that day, I did not deal with or sell ecstasy pills to anyone including Insp Chia. (Witness referred to 'Kemudian saya telah ikut lelaki Cina tersebut dan dia arahkan saya supaya pergi ke tingkat atas tempat letak kereta untuk menerima pil tersebut.') This did not happen.
>
> On that day, I went to Jaya Jusco by bus. (Witness told SP6 said: 'Tetapi saya tidak berbuat demikian kerana saya beritahu lelaki Cina tersebut saya mahu menerima bekalan tersebut di kawasan berhampiran saya.') Insp Chia did not tell me this. (Then Insp Chia said:

'Akhirnya lelaki Cina itu telah setuju untuk hantar bekalan tersebut kepada saya ke kawasan di mana kereta saya di parking.') I did not agree to do this.

While we were having meal Ah Li asked me to follow Ah Wai to see where he had parked his car. After that I followed Ah Wai. After we came out of KFC, Ah Wai showed me where he had parked his car. After I was shown, I came back to the table. At that time, I saw Ah Li with Steven at the same table. That was the Steven who was introduced to me at the disco by Ah Li. Besides Steven and Ah Li, I saw two shopping bags. They were plastic bags and were placed on an empty chair between Steven and Ah Li. I was seated opposite. (Saksi dirujuk kepada P19 and P23) These were the bags. One plastic bag had two mineral water bottles. The other bag had junk food like keropok on the top. I could not see what was below. Then Ah Li asked me to wait with Steven for another friend to come. After a short while, Ah Li asked me to bring the two plastic bags and put in Ah Wai's car. Then Ah Li told me that the two bags are birthday presents for Ah Wai's son. So I took the two bags and went to Ah Wai's car. I was walking with Ah Wai towards his car. I did not know that one of the bags contained ecstasy pills. While carrying the bags, I did not ask Ah Wai where was the money. Ah Wai did not say he wanted to see the pills. Ah Wai opend the car door with the remote control. He did not say he wanted to take the money from the boot of the car. I then put the two plastic bags in the car at the front passenger seat. Before I managed to go back to KFC, 4–5 persons rushed towards me. I do not know who they were. They were not in uniform. At first, I thought they wanted to rob somebody. I was in a state of panic. I was arrested and beaten up. When they were rushing towards me, I tried to avoid them. They rushed towards me. At that time, I did not know that the two bags contained drugs. When I was arrested, they told me I had committed an offence.

Before I carried the two bags and left the table, the other person did not come.

After placing the two bags in the car, I had intended to go back to KFC to meet Ah Li. He told me that he will pay back the money to me. But he did not pay me. On that day, I was not supplying ecstasy pills to Insp Chia. (Saksi dirujuk kepada D30) I do not know where KL Lim is now.

On that day, Ah Li did tell me that he wanted to wait for a friend to come and then will pay me.

In his cross-examination, he said:

Ah Li told me that he needed the money to use as salary for his employees. Ah Li and I are good friends. I do not know his full name. I did not have the money to lend Ah Li. I did not ask him to borrow from KL Lim directly as KL Lim does not know Ah Li. I have known KL Lim for 7–8 years. There was no documentation for the money Ah Li borrowed from me. I do not know Ah Li's full name. I deny that Ah Li did not borrow the money from me. I just lent the money to him as a friend.

I went with Ah Wai to see his car as Ah Li told me to go. I did not ask Ah Li why. I walked with Ah Wai to his car. I deny that I did not walk with Ah Wai to his car.

One plastic bag had mineral water. I just saw two bottles there. The other bag had junk and keropok. I did ask Ah Lim why he wanted me to send the plastic bags to Ah Wai's car. He told me that he needed my help to send the two bags to Ah Wai's car. So I just helped him as he is my good friend. I helped him as this was a small matter. I did not ask Ah Li what was in the plastic bag as he had told me it was a present. I deny that the two bags were mine and that I wanted to give them to Ah Wai. I deny that I knew the contents of the bags. I deny that I did not walk with Ah Wai to the car. I deny that I asked Ah Wai for the money. I deny that I did not allow Ah Wai to have a look at the contents of the bags as I knew what the contents were. I deny that I tried to run away when the police wanted to arrest me.

In substance, the defence of the accused is that he went to KFC on being called by Ah Li on his handphone. He was told that he will be paid back his money. When he was in KFC with Ah Li PW6 joined them. Ah Li then telephoned one Steven and asked him to bring something. Steven was with Ah Li when the accused returned with PW6 after having gone out for a while on the instruction of Ah Li. The accused saw two plastic bags there. One had two mineral water bottles. The other had some junk food like keropok on top. The accused did not know what was below the junk food. Ah Li then asked the accused to put the two plastic bags in PW6's car. The accused put them in the car at the front passenger seat. He did not know that they contained ecstasy pills. He was arrested. The prosecution then applied to call evidence in rebuttal to rebut the evidence on the purported loan to the accused by KL Lim. The witness to be called was KL Lim himself. The prosecution explained that this evidence was not put to any of the prosecution witnesses and was therefore not foreseeable. Thus, the prosecution had no way of knowing this line of defence till the accused gave evidence. Learned counsel said that there was no witness to whom this defence could have been put. I gave leave to the prosecution to call KL Lim (PW9) to give evidence in rebuttal. In his examination-in-chief he said that he did not know the accused and that he had not given him a loan of RM10,000. As he said:

> I am still working as a contractor. I have been a contractor for about 10 years. I owned a factory before. It is called Tec Interior. The factory is registered. The factory deals with furniture. I was running the business since the year 2000. The factory is no more in operation since the year 2002. (Witness shown a document) This is the document relating to the registration of the factory. (Witness referred to D30) This is my business card. The factory (Tec Interior) has not given any loan to anybody. I do not know the accused. Being a businessman I give my card to others. I am not too sure whether I gave the card to the accused. I have not given a loan of RM10,000 to the accused. I have not given a loan of RM10,000 to anybody.

In his cross-examination, he said:

> It is possible that I gave D30 to the accused as I am a businessman. (Witness shown two persons named Ee Boon Leong and Lim Shang Hwa) I have seen them before but I do not know them. I called Ee Boon Leong on the handphone yesterday at about 6.30pm. The number is 019-2191124. I did not tell him that Insp Woon and four other police officers were in my house. I also telephoned Ee Boon Leong's cousin who is my friend. I know that Ee Boon Leong is the accused's brother. Ee Boon Leong's cousin is called Ah Wai. His telephone number is 012-63337193. I spoke to Ah Wai at about 2pm. I did not tell him that the police are forcing me to come to Court. It is not true that yesterday's food was packed for me by the police. Insp Woon saw me two times. It was not in my house. On the first time, it was at Shangri-la Hotel. On the second time, it was at a shop near my house. He asked me to be a witness. My NRIC number is 740910-14-5369. (Witness asked to produce his NRIC. D/C views it) I agree that I gave my NRIC number to defence counsel (Mr Bachan Singh) on 3 August 2003 at about 11.30am in his house in Ipoh. Together with me were Ee Boon Leong and Lim Sheng Hwa. I had come from Kuala Lumpur to Ipoh with these two people.
>
> Q: I put it to you that in their presence you told me that you had given a loan of RM10,000 to the accused to enable him to lend it to his friend called Ah Li.
>
> A: I did not tell this to the counsel.
>
> Q: I put it to you that you know the accused for a long time.

A: No. I do not know him. I deny that I gave the money to the accused at an interest of 5% per month. I deny that accused paid me interest of RM500 per month for a few months. I deny that after that I was harassing the accused to pay. I deny that on 30 April 2001, accused rang me up and told me that he would be returning the money to me with the interest as Ah Li would be repaying him. I agree that I told Ee Boon Leong on 3 August 2003 that I am frightened to come to Court as a witness.

As he said in his re-examination:

Q: You said that you had seen Ee Boon Leong and Lim Sheng Hwa and do not know them. Why then did you say you went to Ipoh with them?

A: My friend Ah Wai asked me to go to Ipoh with them.

Learned counsel then applied to call Lim Sheng Hwa (DW2) as a surrebuttal witness. I allowed the application. In her examination-in-chief she said:

The accused's younger brother is my boyfriend. His name is Ee Boon Leong. On 3 August 2003, I and Ee Boon Leong brought KL Lim to defence counsel's office in Ipoh. It was a Sunday. We saw counsel at about 11.30am. I do not know whether Ee Boon Leong knows KL Lim.

Q: What did KL Lim tell me in my office?

A: KL Lim told counsel that he did give a loan to Ee Boon Keat. It was RM10,000 with interest of 5% per month.

Q: What else can you remember?

A: KL Lim told counsel that five payments of the interest had been paid and that payment was stopped after that.

Q: Do you remember KL Lim telling me the purpose of the loan?

A: The purpose was because Ee Boon Keat's friend needed the money.

Q: Can you remember Ee Boon Keat's friend's name who needed the money?

A: Ah Li.

Q: Can you recollect whether KL Lim told me what happened after Ee Boon Keat stopped making the payment?

A: KL Lim told counsel that in April 2001 Ee Boon Keat rang him up regarding the loan.

In cross-examination, she said:

Ee Boon Leong has been my boyfriend for two years.

Q: You are telling the Court what Ee Boon Leong told you to tell?

A: No. It is not true that I did not hear the conversation. I deny that my evidence is a lie.

[12] If the evidence of DW2 that PW9 had said that he had given a loan of RM10,000 to the accused which he had denied is admissible and accepted the credibility of PW9 as a witness of truth will come into sharp focus. The prosecution argued that the evidence of DW2 on what she had heard about the loan is hearsay and is therefore inadmissible. Such a general submission is a reflection of a poor

understanding of the law relating to the admissibility of hearsay evidence. It is settled law that the admissibility of hearsay evidence is dependent on the purpose for which it is tendered. As LMD de Silva said in the celebrated case of *Subramaniam v Public Prosecutor* [1956] MLJ 220 at p 222:

> In ruling out peremptorily the evidence of conversation between the terrorists and the appellant the trial judge was in error. Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.

In explaining this rule Lord Wilberforce said in *Ratten v R* (1972) AC 378 at p 387:

> The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called is no objection to its admissibility. Words spoken are facts just as much as any other actions by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially', that is, as establishing some fact narrated by the words.

[13] The authorities referred to show that evidence of a statement made by a person who is not himself called as a witness is not hearsay if it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. It is admissible if it is relevant. It is obvious that the evidence of DW2 on the conversation cannot be used to establish its truth as she was only testifying on what she had heard. Thus, her evidence can only establish that the conversation took place. Its truth will arise for consideration only after it has been established that it did in fact take place. That will be the subject matter of a different exercise. The fact that there was such a conversation on the loan is very relevant as it will go to the heart of the defence. It is a rule of evidence that if the conversation had not been brought to the attention of PW9 when he gave evidence then it will not be admissible (see *Awadh Behari Sharma v State of Madya Pradesh* AIR 1956 SC 788). This condition has been satisfied as PW9 when asked in his cross-examination denied that the conversation took place. DW2 had said that it did take place. The evidence of DW2 on the conversation between PW9 and learned counsel is therefore admissible in order to establish not its truth but whether the conversation did in fact take place. In making such a determination, it is first necessary to consider the credibility of PW9 which, to my mind, does not inspire much confidence. Having said in the initial part of his cross-examination that he did not know DW2 and Ee Boon Leong though he had seen them, PW9 proceeded to say later that he had gone from Kuala Lumpur to Ipoh with them to meet learned counsel. This shift in his evidence was not explained. It is also strange that Inspector Woon should see PW9 on two occasions, once at the Shangri-la Hotel and on another occasion at a shop near PW9's house, in order to ask him to be a witness. Why was it necessary for Inspector Woon to meet PW9 on two occasions? Why did the meeting not take place in the police station? PW9 had also told Ee Boon Leong that he was frightened to go to Court as a witness. Was this because he was merely frightened of attending court as a witness?

If not was this because of something that Inspector Woon had told PW9? Or was PW9 threatened by Inspector Woon to deny the loan transaction? Is that why he had given evasive answers to questions regarding him knowing DW2 and Ee Boon Leong? These questions can be best answered by only Inspector Woon. He ought to have been recalled as a rebuttal witness by the prosecution to resolve the doubts. The failure to do so means that the questions posed earlier remain unanswered thereby creating gaps and doubts in the evidence of PW9. It must also be observed that the evidence of the accused on the loan that he had taken from PW9 must have been consistent with his statement to the police; if not his credit would have been impeached. In the circumstances I am unable to accept PW9 as a witness of truth. That leads to an assessment of the credibility of DW2 in order to determine whether there was in fact a conversation between PW9 and learned counsel on the loan as testified by her. Her evidence on the loan in her examination-in-chief was rather detailed. But it was subjected to only a general question in cross-examination which she denied. In order to appreciate the sufficiency of her cross-examination of DW2 it must be remembered that PW9 had admitted that he met learned counsel with Ee Boon Leong and DW2 in Ipoh. He must have been taken there for a purpose. If the conversation on the loan did not take place something else must have occurred. Clearly, it could not have been for the purpose of making a courtesy call on learned counsel. Perhaps PW9 was asked to agree that there was in fact a loan with which he was not willing to co-operate. If that or something else had transpired in Ipoh it ought to have been put to DW2 in cross-examination. In explaining the need for such a line of questioning Hunt J said in *Allied Pastoral Holdings Pty Ltd v Commissioner for Taxation* (1983) 1 NSWLR 1 at p 16:

> There are many reasons why it should be made clear … not only that the evidence of the witness is to be challenged but also how it is to be challenged. Firstly, it gives the witness the opportunity to deny the challenge on oath, to show his mettle under attack (so to speak), although this may often be of little value. Secondly, and far more significantly, it gives the party calling the witness the opportunity to call corroborative evidence which in the absence of such a challenge is unlikely to have been called. Thirdly, it gives the witness the opportunity both to explain or to qualify his own evidence in the light of the contradiction of which warning has been given and also, if he can, to explain or qualify the other evidence upon which the challenge is to be based.

[14] Hunt J explained the operation of the rule by way of an example. There is an issue between X and Y as to whether X was in Melbourne on a certain day and X bears the burden of proof on the issue. X gives evidence that on that day he was not in Melbourne but in Sydney. The case of the opposing party, Y, is that on that day X was in Melbourne. Y should cross-examine X not only to show that his statement about being in Sydney is denied but to put to X that he was in fact in Melbourne. The failure by the prosecution to have put its version of events to DW2 has therefore prejudiced the defence. As a matter of fact, the failure by the prosecution to have effectively cross-examined DW2 will amount to an acceptance of her testimony (see *Ayoromi Helen v Public Prosecutor* [2005] 1 MLJ 699). In the circumstances I accepted the evidence of DW2. This means that there was in fact a conversation on the loan between PW9 and learned counsel.

[15] The corollary of my finding that the conversation on the loan of RM10,000 to the accused by PW9 did in fact take place means that the defence advanced by the accused is not a concoction and is therefore probable. This could only be negated by the evidence of the informer (Ah Li) on the conversation that he is supposed to have had with the accused on the settlement of the loan as testified by the accused. The failure of the prosecution to have called the informer as a witness either in the course of its case or in rebuttal is thus fatal. The defence of the accused therefore remains unchallenged and has, consequently, raised a reasonable doubt in the case for the prosecution. The evidence of PW6 on the role played by the accused must also be viewed against this background. The prosecution has therefore failed to prove its case against the accused beyond reasonable doubt. In the upshot I acquitted and discharged him.

Accused acquitted and discharged.

Reported by Loo Lai Mee